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Sharia Principles in the Financial Services Authority Regulation on Dispute Settlement Alternatives

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Article	Abstract
<p>Keywords: Alternative Dispute Resolution; Islamic Banking; Sharia Principle; Spiritual Rights.</p> <p>Article History Received: Oct 22, 2020; Reviewed: Jan 18, 2021; Accepted: Jan 29, 2021; Published: Jan 31, 2021.</p> <p>DOI: 10.28946/slrev.Vol5.Iss1.864.pp65-70</p>	<p>There is a legal disharmony with the Sharia Banking Law in the regulation on alternative dispute resolution institutions. This problem arises because the regulation does not pay attention to sharia principles, as mandated by Article 55, Paragraph 3 of the Sharia Banking Law. Meanwhile, the application of sharia principles is a spiritual right of consumers which also requires legal protection. This research is intended to assess alternative dispute resolution institutions' regulations, particularly Financial Services Authority Regulation from a consumer protection perspective, particularly spiritual rights. This research is categorized as an empirical normative study, using a philosophical, historical approach and a content analysis of the Financial Services Authority Regulation. The results of this study indicate that the Financial Services Authority Regulation on Alternative Dispute Resolution Institutions has not accommodated spiritual rights in dispute resolution for the Islamic banking industry. A weak understanding of spiritual rights causes it in the context of dispute resolution. It also creates another problem in the form of a lack of attention and policies that support the protection of spiritual rights, both in regulatory and banking institutions. In the context of dispute resolution, there are general consumer rights, such as the right to get advocacy, while the application of sharia principles is a special right. Based on these findings, it is recommended that regulatory institutions, particularly the Financial Services Authority, pay adequate attention to the entire financial service industry under their respective characteristics. It is an important matter because the protection of spiritual rights supports the development of the Islamic finance industry both in Indonesia and globally.</p>

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INTRODUCTION

In the Islamic finance industry, the issue of dispute resolution is essential. It is because dispute resolution is a case that may occur in a business transaction. The dispute resolution pattern can be made through court mechanisms or out of court, known as Alternative Dispute Resolution

(ADR) system. Along with developing the Islamic financial service businesses, the dispute resolution mechanism also grows and caters to consumers' needs. It happened as Islamic financial institutions grew specific needs in the form of fulfilling sharia principles in all aspects. It is one of the specific characteristics of Islamic financial institutions, including banking.

This article is a further study of previous research,¹ which found legal disharmony in alternative dispute resolution, to the point of causing legal uncertainty. There is a legal disharmony with the Sharia Banking Law in the regulation on Alternative Dispute Resolution Institutions. This problem arises because the regulation does not pay attention to sharia principles, as mandated by Article 55, Paragraph 3 of the Sharia Banking Law. In Article 55 Paragraph (3) of the Sharia Banking Law, it is stated that settlement of disputes other than in a religious court must comply with sharia principles. The article shows that the application of sharia principles in settlement of Islamic banking disputes is essential. The settlement of Islamic banking disputes through religious courts is not required to comply with sharia principles. It is because the religious court is an Islamic law enforcement institution. It means that it has automatically complied with and implemented sharia principles. Meanwhile, it is necessary to receive confirmation in other institutions so that it becomes a concern to be fulfilled. It is essential, considering that the application of sharia principles is a spiritual right for Islamic banking consumers.

This article explicitly examines the regulations related to alternative dispute resolution institutions in Indonesia by using consumer protection, especially on spiritual rights. According to Aulia Muthiah,² consumer protection is one of the most dynamic legal studies, both from the perspective of positive law and Islamic law. It is because consumer protection studies are directly related to economic and/or financial activities, which continue to develop by changing times and technological advances. However, studies on consumer protection, especially consumers of Islamic financial institutions, have not been widely found. One study from Omar Oseni³ correlates effective consumer protection regulations in Islamic finance with spending and trust in fatwas.

Besides, several researchers have researched the resolution of disputes over Islamic financial institutions: Zulkifli Hasan and Mehmet Asutay⁴, Abikan,⁵ Omar A. Oseni at all (2012)⁶ (2016)⁷, and Rasyid. However, there is no unifying theme that connects explicitly content analysis of alternative dispute resolution institution's regulations with the concept of consumer pro-

¹ Ro'fah Setyowati, Indah Purbasari, and Encik Muhammad Fauzan, "Consumers Spiritual Rights in the Islamic Banking Dispute out of Court Settlement in Indonesia," *Journal of Social Studies Education Research*, 9.4 (2018), 334–51 <<https://doi.org/10.17499/jsser.64249>>.

² Aulia Muthiah, *Hukum Perlindungan Konsumen: Dimensi Hukum Positif Dan Ekonomi Syariah* (Yogyakarta: Pustaka Baru, 2018).

³ Umar A. Oseni, "Fatwā Shopping and Trust: Towards Effective Consumer Protection Regulations in Islamic Finance," *Society and Business Review*, 12.3 (2017), 340–55 <<https://doi.org/10.1108/SBR-03-2017-0016>>.

⁴ Zulkifli Hasan and Mehmet Asutay, "An Analysis of the Courts' Decisions on Islamic Finance Disputes," *ISRA International Journal of Islamic Finance*, 3.2 (2011), 41–71.

⁵ I Abdulqadir Abikan, "Islamic Banking Disputes, Between Judicial Pluralism and ADR," *Journal of Islamic Banking and Finance*, 1.1 (2011), 11–29.

⁶ Umar A. Oseni, "Dispute Resolution in the Islamic Finance Industry in Nigeria," *European Journal of Law and Economics*, 40.3 (2015), 545–64 <<https://doi.org/10.1007/s10657-012-9371-y>>.

⁷ Umar A. Oseni, Abideen Adewale, and Nor Razinah Binti Mohd Zain, "Customers' Perceptions on the Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia," *Review of Financial Economics*, 31 (2016), 89–98 <<https://doi.org/10.1016/j.rfe.2016.05.004>>.

tection focused on spiritual rights. Moreover, dispute resolution has also been developed through the ODR (Online Dispute Resolution) system today.⁸ The issue of dispute resolution in Islamic financial institutions needs to be handled to encourage Islamic financial institutions' development. Thus, a study linking Islamic financial institutions' consumer protection with regulations related to dispute resolution is important to conduct.

In connection with the problem in the form of legal disharmony above, researching the financial services authority regulations related to alternative dispute resolution institutions from a consumer protection perspective is needed. It is intended to determine whether alternative dispute resolution regulations provide adequate protection for Islamic banking consumers. This problem must receive serious attention, to increase the trust of Islamic banking consumers in Indonesia, which has only a 6.18% market share.⁹ Another benefit of this study is that it can be used as a policy consideration for financial service authority institutions so that in drafting dispute resolution regulations, they provide adequate protection for their consumers.

RESEARCH METHODS

This research uses an empirical normative method,¹⁰ with a philosophical and critical analytical approach to the content. The philosophical approach is used to understand the relationship between consumer protection and spiritual rights and the relationship between spiritual rights and dispute resolution of Islamic financial institutions. Meanwhile, the historical approach is applied to see the issuance of the two regulations mentioned above with the Consumer Protection Law and the Islamic Banking Law in Indonesia. Furthermore, a critical analytical approach is used to analyze the regulation's intended content by using analysis tools for consumers' spiritual rights and referring to the principle of balance in the Consumer Protection Law.

The focus of this research aims to analyze the content of the Financial Services Authority's regulations regarding Alternative Dispute Resolution Institutions, whether they provide consumer protection in the form of complying with sharia principles. Therefore, this study's population and sample are the same, namely the Financial Services Authority Regulation on Alternative Institutions for Dispute Resolution, namely Financial Services Authority Regulations Number 01 / POJK.07 / 2013 concerning Consumer Protection in the Financial Sector and Financial Services Authority Regulations Number. 01 / POJK.07 / 2014 concerning Alternative Dispute Resolution Institution. As for the data collection method, in addition to a literature study of related regulations and references, interviews were also conducted with officials at the Financial Services Authority and the Indonesian Banking Dispute Resolution Alternative Institution.

To gain the desired understanding, the results and analysis of this article will describe: 1) Application of Sharia Principles" as a Spiritual Right in Consumer Protection; 2) Characteris-

⁸ Udechukwu Ojiako and others, "An Examination of the 'Rule of Law' and 'Justice' Implications in Online Dispute Resolution in Construction Projects," *International Journal of Project Management*, 36.2 (2018), 301–16 <<https://doi.org/10.1016/j.ijproman.2017.10.002>>.

⁹ Financial Services Authority (OJK), *Snapshot Perbankan Syariah Indonesia 2020* (Jakarta) <[https://www.ojk.go.id/id/kanal/syariah/berita-dan-kegiatan/publikasi/Documents/Pages/Snapshot-Perbankan-Syariah-Juni-2020/Snapshot Perbankan Syariah Juni 2020.pdf](https://www.ojk.go.id/id/kanal/syariah/berita-dan-kegiatan/publikasi/Documents/Pages/Snapshot-Perbankan-Syariah-Juni-2020/Snapshot%20Perbankan%20Syariah%20Juni%2020.pdf)>.

¹⁰ Irwansyah and Ahsan Yunus, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel* (Yogyakarta: Mirra Buana Media, 2020).

tics in Settlement of Islamic Banking Disputes with Alternative Dispute Resolution Mechanisms; 3) Financial Services Authority Regulations concerning Alternative Institutions for Dispute Resolution in Sharia Banking Dispute Resolution; 4) Regulations on Alternative Dispute Resolution and Consumer Protection in Islamic Banking.

ANALYSIS AND DISCUSSION

The Implementation of Sharia Principles as a Spiritual Right in Consumer Protection

The spiritual aspect is universal. In Islam, there are sharia principles known as the concept of halal haram. This concept is currently developing into a global halal industry. In the teachings of Judaism, there is a similar concept called those. Likewise, in Hinduism, there is a prohibition on eating beef. The value of this belief is a spiritual aspect that is inherent in everyone. One of the sources of human spirituality comes from religious values or beliefs. It shows that the spiritual aspect is inherent in everyone.

In the context of consumer protection in Indonesia, the term spiritual is found in Law Number 8 of 1999 concerning Consumer Protection. It is stated in Article 2 regarding the principles of the Consumer Protection Law, one of which is the principle of balance. Furthermore, in the explanation of number 3 Article 2 of the Consumer Protection Law states that the principle of balance is intended to balance the interests of consumers, business actors, and government in a material or spiritual sense. The term "spiritual" is juxtaposed with the material, meaning that "spiritual" are immaterial things. In Indonesia's legal system, religious values or beliefs are immaterial issues that are often demanded by consumers to be heeded and fulfilled. Therefore, in Indonesia, law number 33 of 2014 concerning Halal Product Guarantee has been issued. Based on this, it is increasingly vital that the spiritual aspect is protected by law. From the above, it is understood that the relationship between the concept of "spiritual" and consumer protection is clear. However, the Consumer Protection Law does not explicitly mention the term spiritual rights, nor does it specify their form. Therefore, the use of the term "spiritual rights" in this study is the meaning of legal phenomena that exists and develops in society. Furthermore, it has been absorbed by the Consumer Protection Law as a part of the principle of balance.

On the other hand, theoretically, the obligation to pay attention to sharia principles for Muslims, referring to all aspects of life, shows the validity of the credo theory¹¹ or *shahada* theory.¹² The theory of *shahada* is one of the theories that Islamic law applies to Muslims.¹³ Meanwhile, based on the Explanation of Number 37 Article 49 of Law Number 3 of 2006 concerning Amendments to the Law on Religious Courts, it is stated that what is meant by "between people who are Muslim is included as a person or legal entity who automatically submits himself voluntarily to Islamic law". Thus, according to the law, Islamic banking is included in the category of "person". Therefore, it is also mandatory for Islamic banking to apply Islamic

¹¹ Muhamad Mas'ud, Rosbandi, and Sugih Suryagalih, "Eksistensi Teori Kredo Dalam Pemberlakuan Hukum Islam Di Indonesia," *Islamika: Jurnal Agama, Pendidikan, Dan Sosial Budaya*, 14.1 (2020), 54–68.

¹² Muhahmmad Haras Rasyid, "Dinamika Hukum Islam Dan Aktualisasi Teori-Teori Berlakunya Hukum Islam Di Indonesia," *Diktum: Jurnal Syariah Dan Hukum*, 11.1 (2013), 15–23.

¹³ Imam Syaukani, *Rekonstruksi Epistemologi Hukum Islam Indonesia Dan Relevansinya Bagi Pembangunan Hukum Nasional* (Jakarta: Rajawali Press, 2006).

law. Based on these thoughts, the Islamic banking law's sharia principles are an implementation of the right to carry out Islamic religious values that are protected by the 1945 constitution.

The enactment of sharia principles that already have a robust legal basis is a form of Islamic law in national law in Indonesia.¹⁴ This tends to develop in Indonesia, especially in the business sector, including resolving disputes related to transactions in Islamic banking. This is in line with Mahfud MD's¹⁵ opinion which explains that constitutionally, Indonesia is based on Pancasila. The first principle of Pancasila shows that Indonesian clothing is a "religious nation-state". Some people call this pattern Theo-democracy. If it is related to the concept of spiritual rights, then this is the philosophical and constitutional foundation for the Indonesian people's spiritual rights. It means that people have rights freely and receive protection in carrying out their religious laws. Meanwhile, if this phenomenon is related to consumer protection, the community needs to get protection. In this context, when the state pays attention to consumer protection, this is one of the United Nations' successes on the importance of fighting for consumer rights at the world level.¹⁶

In this regard, according to Ahmadi Miru and Sutarman,¹⁷ the principles of consumer protection in Article 2 of the Consumer Protection Law refer to the philosophy of national development, which is oriented towards the state philosophy, namely Pancasila. The five principles contained in the article can be divided into three parts, namely: first, the principle of benefit, in which there is a principle of security and consumer safety; second, the principle of justice which includes the principle of balance; and third, the principle of legal certainty. In the context of the agreement between consumers and Islamic banking, it must also fulfil the agreement's principles of good faith. In Indonesia, this is guaranteed under Articles 1341, 1491, 1492 of the Civil Code. Apart from that, Annalisa¹⁸ also states that an agreement must be rational and must be implemented in good faith as regulated in Article 1338 paragraph (3) of Indonesian Civil Law. In settlement of Islamic banking disputes, the obligation to comply with sharia principles has been described as having strong rationality, both for consumers and banking institutions themselves.

In the context of dispute resolution, the application of sharia principles is part of *maqashid sharia*. It means that the application of sharia principles in settlement of Islamic banking disputes is part of Islamic law principles that form the basis of Islamic banking operations. Therefore, it should not be abandoned, because it is an obligation of individuals or legal entities or sharia-based institutions to carry out Islamic law in the context of preserving property. For Islamic banking institutions, this is also required in sharia-based business activities. In this re-

¹⁴ Nelly van Doorn-Harder, "Review Book of Muslim Legal Thought in Modern Indonesia by R. Michael Feener," ed. by R Michael Feener, *Journal of the American Oriental Society*, 130.1 (2010), 132–35 <<http://www.jstor.org/stable/25766969>>.

¹⁵ Moh. Mahfud MD., *Membangun Politik Hukum, Menegakkan Konstitusi* (Jakarta: Raja Grafindo Persada, 2011).

¹⁶ Christie Ding Yean Joon and Sakina Shaik Ahmad Yussof, "Perkembangan Perlindungan Pengguna: Cabaran Dan Hala Tuju Institusi Pelindung Pengguna Di Malaysia," *Jurnal Undang-Undang Dan Masyarakat*, 20 (2016), 71–82.

¹⁷ Ahmadi Miru and Sutarman Yudo, *Hukum Perlindungan Konsumen* (Jakarta: Raja Grafindo Persada, 2015).

¹⁸ Annalisa Yahanan, Febrian Febrian, and Rohani Abdul Rahim, "The Protection of Consumer Rights for Aviation Safety and Security in Indonesia and Malaysia," *Sriwijaya Law Review*, 1.1 (2017), 027 <<https://doi.org/10.28946/slrev.Vol1.Iss1.7.pp027-043>>.

gard, Chapra¹⁹ stated that the measure of business success in Islam is not only seen in terms of the accumulation of material but also judged by the extent to which a person can realize the *maqashid sharia*,²⁰ in the form of the application of sharia principles. *Maqashid sharia* is a philosophy of the purpose of Islamic law in maintaining five things, including property. Therefore, the quality of compliance of a Muslim or Islamic banking consumer is a necessity that must be implemented by both the consumer and the Islamic banking institution.

“Sharia principles” in the context of sharia banking dispute resolution, contained in Article 5 Paragraph (3) of the Sharia Banking Law, states that dispute settlement conducted outside the Religious Courts must be following sharia principles. This means that the settlement of disputes that occurs in Islamic banking is obliged to apply Islamic law. This clause clearly shows that Islamic banking law requires sharia compliance for every sharia bank and its consumers. The concept of sharia compliance is a logical consequence of the emergence of a discourse on business that refers to the Islamic financial system.²¹ Sharia compliance is essential, as stated by Wilson²² as a form of guarantee needed by consumers when investing in Islamic financial institutions. Practically, this is widely requested by investors in the Gulf and Malaysia who wish to invest with an exceptional guarantee in the form of sharia compliance.

From the description above, it can be understood that the terminology and concept of 'spiritual rights' are indeed new.²³ This concept is an understanding of the crystallization of norms/values and/or principles of human spirituality. Meanwhile, from a consumer protection perspective, every consumer has spiritual rights that need legal protection with the transactions carried out. As for the context of Islamic banking dispute resolution, one of the spiritual rights referred to is the fulfilment of sharia principles in resolutions conducted outside the Religious Courts. Therefore, the fulfilment of sharia principles in the event of a dispute between a consumer and an Islamic banking institution is one of Islamic banking consumers' spiritual rights.

Characteristics in Settlement of Islamic Banking Disputes with Alternative Dispute Resolution Mechanisms

Islamic banking dispute resolution has a distinct characteristic. What is meant by 'distinct' is different from that of conventional banking institutions. Such a difference is caused by the requirements for compliance with sharia principles in all aspects of sharia banking operations. It goes by the term of sharia compliance. If it is linked to the concept of spiritual rights above, then sharia compliance is generally a form of spiritual rights.

Dispute resolution practices that meet sharia compliance need to pay attention to the suitability between dispute resolution mechanisms and Islamic philosophy. This is in line with the view that harmony with sharia principles is required in all aspects and stages, including the dis-

¹⁹ Muhammad Umer Chapra, *Islam and The Economic System, Islamic Economics Series* (Leicestershire: The Islamic Foundation, 1992), xvii.

²⁰ Muhammad Zaki and Bayu Tri Cahya, “Aplikasi Maqasid Asy-Syari’ah Pada Sistem Keuangan Syariah,” *BISNIS : Jurnal Bisnis Dan Manajemen Islam*, 3.2 (2016), 312 <<https://doi.org/10.21043/bisnis.v3i2.1497>>.

²¹ Agus Triyanta, “Implementasi Kepatuhan Syariah Dalam Perbankan Islam (Syariah) (Studi Perbandingan Antara Malaysia Dan Indonesia),” *Jurnal Hukum - UII*, 16.Special Edition (2009), 209–28 <<http://jurnal.uui.ac.id/index.php/IUSTUM/article/viewFile/3870/3445>>.

²² Rodney Wilson, “Islam and Business,” *Thunderbird International Business Review*, 48.1 (2006), 109–23 <<https://doi.org/10.1002/tie.20088>>.

²³ Ro’fah Setyowati, “Penyelesaian Pertikaian Perbankan Islam Di Indonesia Dalam Perspektif Perlindungan Pengguna” (Universiti Kebangsaan Malaysia, 2012).

pute resolution process.²⁴ It is also acknowledged or justified by the Financial Services Authority in the Jakarta²⁵ and Semarang offices.²⁶ Indonesian Banking Alternative Dispute Resolution Institute also acknowledged it.²⁷ Such needs are because Islamic banking has different characteristics compared to conventional banking. It is also contained in the Preamble of the Sharia Banking Law.

The issues that need to be addressed so that dispute resolution can fulfill sharia compliance are:²⁸ (1) Judges/arbitrators who handle sharia banking disputes must understand Islamic economic law, especially in the field of Islamic banking; and (2) Legislation referred to by the judge/arbitrator in providing legal considerations may not conflict with sharia principles. According to the first point above, there need to be special requirements for judges/arbiters handling cases of Islamic banking disputes. In settlement of Islamic banking disputes through a judiciary, the Great Court stipulated a regulation that judges who handle sharia banking disputes must have a special certification.

Related to the second requirement, legislation is needed or known as 'material law', which is in line with sharia principles. This is important to pay attention to, because if material law is used as a legal principle and consideration, while selection has not been made of its conformity with sharia principles, then it has the potential to produce decisions that are contrary to sharia principles.²⁹ In this regard, Fiska³⁰ observes the characteristics of sharia compliance in the resolution of Islamic financial disputes from a fairly broad perspective and scope, including a) making contracts; b) determining the allocation of the choice of forum (litigation or non-litigation options); c) handling of defaults or delays for payment (*ta'widh*); d) executing Mortgage Rights; and e) determining *taflis* (sharia bankruptcy). Some of these cases should have been carried out before the dispute occurred, such as making contracts or *akad*, choice of law, and forum choice.

By referring to the criteria for sharia compliance in sharia banking dispute resolution as previously described, it can be specified as follows:

1. The existence of a particular clause related to sharia compliance in every law becomes the basis for the settlement of sharia banking disputes.
2. Dispute resolution is handled by a judge/ arbitrator who has competence in Islamic economic and financial law through a professional certification system.
3. Material law is the reference basis for the judge/arbitrator's decision with consideration of what is appropriate and or not contrary to sharia principles.

²⁴ E. R. Adawiah, "Shariah Framework for Shariah Compliance Review, Audit & Governance" (Kuala Lumpur, 2007).

²⁵ Hudiyanto (Directorate of Legal Development and Consumer Protection of the Financial Services Authority), "Interview on October 9" (Jakarta, 2018).

²⁶ Hans Ori Lewi, "Interview on October 20 to Consumer Education, and Protection OJK Regional 3 Central Java, and Yogyakarta Special Region Staff" (Semarang, 2018).

²⁷ Himawan (LAPSPI Director), "Interview on October 9" (Jakarta, 2018).

²⁸ Setyowati, "Penyelesaian Pertikaian Perbankan Islam Di Indonesia Dalam Perspektif Perlindungan Pengguna."

²⁹ Ro'fah Setyowati, "Karakter Khusus Penyelesaian Sengketa Perbankan Syariah Di Indonesia," *Jurnal Academica*, 2014.

³⁰ Fiska Silvia Raden Roro, "Karakteristik Sharia Compliance Dalam Penyelesaian Sengketa Ekonomi Syariah Di Indonesia," *Jurnal Hukum Ekonomi Islam*, 1.1 (2017), 108–43.

4. The implementation of decisions and/or executions is carried out by the appropriate institutions which observe sharia principles.

Some of the points mentioned above can be used to assess sharia banking dispute regulations through the ADR mechanism. Concerning the settlement of Islamic banking disputes through an out-of-court mechanism, OJK has made special regulations. The primary regulation in question is the Financial Services Authority Regulation No. 1/POJK.07/2014 concerning Alternative Dispute Resolution Institution. Furthermore, on December 14, 2020, the Financial Services Authority Regulation Number 61/POJK.07/2020 concerning Alternative Dispute Resolution Institutions for the Financial Services Sector was promulgated. This regulation is a policy to protect the interests of consumers and society. It means the existence of these regulations elaborates the Financial Services Authority Regulation No. 1/POJK.07/2013 concerning Protection of Financial Services Consumers. The existence of these two regulations confirms that consumer protection is part of the duties of the Financial Services Authority in realizing the national economy to grow sustainably and stably.

The content analysis results on the two regulations above show that there is no principal sharia clause in the Financial Services Authority Regulation or an obligation to comply with sharia principles in dispute resolution. In this regulation, there is also no obligation for the arbitrator to have unique competition, and there is no obligation for the arbitrator to refer to references that are appropriate or not in conflict with sharia. It is also not explicitly explained, the institutions that handle dispute resolution appropriately in enforcing Islamic law. Based on this, it can be said that the regulations related to the settlement of Islamic banking disputes through the ADR mechanism have not paid attention to sharia compliance. It means that the regulation has not yet fulfilled Islamic banking consumers' needs, so that dispute resolution is following sharia principles. In other words, it can be understood that the principal regulations do not pay attention to the spiritual rights needs of Islamic banking consumers, causing regulations also to ignore these rights. Likewise, the analysis of the latest regulations from the perspective of consumer protection in Islamic banking shows no significant difference.

Financial Services Authority Regulations concerning Alternative Institutions for Dispute Resolution in Sharia Banking

Basically, dispute resolution is part of law enforcement studies. For Islamic financial institutions, dispute resolution cannot be separated from the concept of sharia compliance. According to Lawrence M. Friedman,³¹ law enforcement always relies on three components of the legal system, namely: 1) legal structure, in this context the relevant institutions; 2) the legal substance or legislation; and 3) legal culture. Based on the above thinking, even though this section emphasizes the institutions and the impact of legal substances related to the principal Financial Services Authority Regulation on Dispute Settlement Alternatives Institutions, it will also intersect with the concept of sharia compliance. In this regard, it is essential to understand the position of The Financial Services Authority Regulation on Dispute Settlement Alternatives Institutions in consumer protection, especially in the resolution of sharia banking disputes.

³¹ Lawrence M. Friedman, *American Law: An Invaluable Guide to the Many Faces of the Law, and How It Affects Our Daily Lives* (New York: W.W. Norton & Company, 1984).

From a historical perspective, The Financial Services Authority Regulation on Dispute Settlement Alternatives Institution is a continuation of Bank Indonesia Regulations Number 8/5 of 2006 concerning Banking Mediation. In this PBI, it is stated in Article 2 that banking mediation is held due to disputes between consumers and banks due to the failure of the consumer's financial demands to be fulfilled by the bank in resolving consumer complaints, which can be resolved through banking mediation. Thus, the two regulations lead to the same goal of providing an alternative dispute resolution institution.³² The Dispute Settlement Alternatives Institution is an effort to provide access to justice more quickly, so it is efficient. Also, the mandate for the establishment of the Financial Services Authority Regulation on Dispute Settlement Alternatives Institution cannot be separated from the content of Article 3 Paragraph (2) of Bank Indonesia Regulations Number 8/5 of 2006, which states that the establishment of an independent banking mediation institution established by a banking association shall be carried out no later than December 31 2007. Meanwhile, in Article 3, Paragraph (4) Bank Indonesia Regulations No. No. 8/5/2006 states that "as long as an independent banking mediation institution has not been established, the banking mediation function is carried out by Bank Indonesia". However, in reality, until the transfer of BI's function to Financial Services Authority took place based on Law Number 21 of 2011 concerning the Financial Services Authority, the institution as intended had not yet been formed.

The formation of the Financial Services Authority is to protect the interests of consumers and society. With the existence of the Financial Services Authority, it is hoped that the interests of consumers can be well protected by carrying out activities in the financial services sector that are orderly, fair, transparent, accountable, able to realize a financial system that grows sustainably and stably, and able to protect the interests of consumers and society.³³ To achieve this goal, the Financial Services Authority is given the authority to provide education, service complaints, and legal defence against consumers who have been disadvantaged by financial service institutions.³⁴ The Financial Services Authority itself has the function of organizing an integrated regulatory and supervisory system for all activities in the financial services sector.³⁵

By combining several Financial Services Authority's duties and functions related to consumers' interests, as a first step, Financial Services Authority issued Financial Services Authority Regulation Number 1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector (POJK Consumer Protection). Meanwhile, to fulfil the duty of providing consumer protection related to dispute resolution, the protection of consumers in the financial services sector must apply the principles of transparency, fair treatment, reliability, confidentiality, and security of consumer data/information, able to handling complaints and resolving consumer

³² I Gede Hartadi Kurniawan, "Implikasi Penerapan Ketentuan Otoritas Jasa Keuangan Mengenai Lembaga Alternatif Penyelesaian Sengketa," *Lex Jurnalica*, 13.1 (2016), 2016.

³³ Agus Suwandono and Deviana Yunitasari, "Kedudukan Lembaga Alternatif Penyelesaian Sengketa Sektor Jasa Keuangan Dalam Hukum Perlindungan Konsumen," *Jurnal Bina Mulia Hukum*, 1.1 (2016), 14–25 <<https://doi.org/10.23920/jbmh.v1n1.2>>.

³⁴ Abdul Aziz Billah Djangaritu, "Peran Lembaga Alternatif Penyelesaian Sengketa Dalam Sektor Jasa Keuangan Guna Mendukung Pembangunan Ekonomi Nasional," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 7.1 (2018), 67 <<https://doi.org/10.33331/rechtsvinding.v7i1.233>>.

³⁵ Ema Rahmawati and Rai Mantili, "Penyelesaian Sengketa Melalui Lembaga Alternatif Penyelesaian Sengketa Di Sektor Jasa Keuangan," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)*, 3.2 (2016), 240–60 <<https://doi.org/10.22304/pjih.v3n2.a2>>.

disputes by simple, fast, and affordable system. This last point means referring to alternative dispute resolution, one of which is the mediation mechanism.³⁶ Furthermore, this is confirmed in the next regulation, namely the Financial Services Authority Regulation Number 1/POJK.07/2014 concerning Alternative Dispute Settlement Institution. The POJK explains that the dispute resolution system occurs in the financial services sector (especially between consumers and financial service institutions), which consists of internal dispute resolution in financial services institutions, settlement through public courts, and through Alternative Dispute Settlement Institutions with a specific procedure.

Financial Services Authority Regulations on Consumer Protection and The Financial Services Authority Regulation on Dispute Settlement Alternatives Institutions have determined the mechanism for resolving consumer complaints through 2 (two) stages, namely settlement of complaints conducted by financial service institutions (internal dispute resolution) and dispute resolutions through judicial institutions or non-judicial institutions (external dispute resolution). This is as explained in Article 2 of The Financial Services Authority Regulation on Dispute Settlement Alternatives Institution that the settlement of complaints must be resolved first by financial services institutions through the consumer complaint unit in each financial service institution. Meanwhile, out of court settlement can be carried out if no agreement is reached on the complaint's settlement through a financial service institution. Furthermore, suppose the parties choose to settle the dispute complaint out of court. In that case, it will be resolved through the Alternative Dispute Resolution Institution which is included in the list of Alternative Dispute Resolution institutions established by the Financial Services Authority.

From the description above, it can be interpreted that The Financial Services Authority Regulation on Dispute Settlement Alternatives Institution is one of the consumer protections instruments, especially for consumers in the financial services sector. Therefore, a philosophical approach is vital to interpret the meaning of these instruments in the framework of developing Islamic financial institutions. Suppose it is linked to the need for spiritual rights as meant in the previous description. In that case, The Financial Services Authority Regulation on Dispute Settlement Alternatives Institution ideally also takes into account the needs of consumers in the Islamic banking industry who have operated in Indonesia for more than 25 years. The Dispute Settlement Alternatives Institution's existence as a manifestation of consumer protection also has principles that must be applied.³⁷ The principles that must be applied by Dispute Settlement Alternatives Institution as stipulated in Article 5-8 The Financial Services Authority Regulation on Dispute Settlement Alternatives Institution are: a. Principle of Accessibility; b. Principle of Independence; c. Principle of Justice; d. Principles of Efficiency and Effectiveness.

Regulations on ADR and Consumer Protection in Islamic Banking

The implementation of The Financial Services Authority Regulation on Dispute Settlement Alternatives Institution, when viewed from the sharia compliance analysis as described above, shows that there are still significant problems in the form of minimal attention to the need for spiritual rights. Several obstacles were encountered, due to the provisions contained in the Fi-

³⁶ Rahmawati and Mantili.

³⁷ Suwandono and Yuanitasari.

financial Services Authority Regulation on Dispute Settlement Alternatives Institution and several supporting regulations.

The assessment of the elements of sharia compliance indicates the difficulty in fulfilling sharia compliance. This is caused by several factors as follows: First, regarding sharia compliance clause: In the Financial Services Authority Regulation on Dispute Settlement Alternatives Institution, no clause is directly related to sharia compliance. The term "sharia" is only found in the preamble when it comes to "Islamic banking". Meanwhile, the definition in other financial services industries never mentions any Islamic financial institution, even though it exists in practice. It means that The Financial Services Authority Regulation on Dispute Settlement Alternatives Institution does not seem to recognize the existence of Islamic financial institutions as a whole. This has resulted in the non-recognition of the mechanisms required, specifically for the settlement of Islamic banking disputes.

Second, competence with certification; in the Financial Services Authority Regulation on Dispute Settlement Alternatives Institution, there is also no clause related to standardization through certification for arbitrators or parties who treat Islamic banking cases. Due to the absence of requirements in terms of competence, this condition can produce misleading decisions. Third, with references or material law as the basis for the decision, The Financial Services Authority Regulation on Dispute Settlement Alternatives Institution also does not contain clauses for using references following sharia principles. Fourth, in the executing institution, The Financial Services Authority Regulation on Dispute Settlement Alternatives Institution does not provide provision on which institution to register and execute the Alternative Dispute Resolution Institutions decision. Therefore, it means referring to the general provisions, the registration and implementation or execution of the Dispute Settlement Alternatives Institution decision to the District Court, as follows the Alternative Dispute Resolution Law. This will cause more problems in the form of legal uncertainty and a lack of protection for the parties' spiritual rights.

Another problem that arises from the Institution Financial Services Authority Regulation on Dispute Settlement Alternatives Institution is the reduced role of Basyarnas as a sharia economic dispute settlement institution. This fact is based on several provisions, namely: a) In the on Financial Services Authority Regulation On Dispute Settlement Alternatives Institution, it has been stipulated that each Financial Service Institution is required to become a member of the related Dispute Settlement Alternatives Institution, and therefore is obliged to pay contributions for the related Institution of Dispute Settlement Alternatives operations; b) Also, Dispute Settlement Alternatives Institution can only be established by the Financial Services Institution and supported by the related Financial Services Institutions association; c) Dispute Settlement Alternatives Institution that can operate, only Dispute Settlement Alternatives Institution that has been included in the list approved by the Financial Services Authority. Meanwhile, in the Financial Services Authority Circular regarding the list of recognized Dispute Settlement Alternatives Institution, there is only one Dispute Settlement Alternatives Institution related to the banking industry, namely the Indonesian Banking Alternative Institute. Thus, it can be said that at The Financial Services Authority Regulation on Dispute Settlement Alternatives Institution, Basyarnas is not recognized as an Islamic banking dispute resolution institution in Indonesia.

The last problem has not received much attention from experts. This is because no study looks explicitly at Dispute Settlement Alternatives Institution from a consumer protection perspective, especially Islamic banking. Meanwhile, suppose you look back at various views related to sharia compliance linked to consumer decisions' trust and strength in making transactions using sharia banking. In that case, this problem could trigger a decline in the Islamic banking industry in Indonesia. This is in line with Capra's view,³⁸ which claims that failure in implementing sharia principles will make consumers move to other banks by 85%. This is one of the differences between conventional and Islamic banking. Islamic banking has a unique character that requires a particular approach in protecting its consumers.

In responding to several regulatory problems in resolving sharia banking disputes through Alternative Dispute Resolutions, the Financial Services Authority at both the central and regional levels has confirmed and acknowledged the particular need to protect consumers' spiritual rights, especially in settlement of sharia banking disputes. However, some elements that serve as benchmarks for sharia compliance mentioned above are still minimal. This is admittedly due to inaccuracy and/or incompleteness in accommodating all industrial needs under OJK's authority. This has resulted in these needs not reflected either in the Financial Services Authority Regulations or in other related regulations. Based on this awareness, the Financial Services Authority hopes to improve and complement these shortcomings through the Dispute Settlement Alternatives Institution integration program in 2020. In this design, 6 (six) compartments will be made,³⁹ one of which is specifically for handling sharia financial service disputes.⁴⁰ However, this concept is not ready to apply soon, as several things need further consideration.⁴¹

CONCLUSION

From the overall description above, it can be concluded that concerning the Regulations on ADR for Islamic banking in Indonesia, there is a problem of legal disharmony with the Sharia Banking Law. This problem arises because these regulations do not pay attention to sharia principles and obligations to enforce sharia compliance. Meanwhile, the application of sharia principles is a consumer right. From the perspective of consumer protection in Islamic banking, these belief values are a spiritual aspect inherent in everyone. Therefore, they are called spiritual rights, which also require legal protection. This study also indicates that the Financial Services Authority Regulation on Alternative Institutions for Dispute Resolution has not accommodated spiritual rights in dispute resolution in the Islamic banking industry. It means that the regulation does not yet provide the superior protection required by Islamic banking consumers. This is due to a weak understanding of spiritual rights in the context of dispute resolution. Akita continued from the problem, namely the lack of attention and policies that support the protection of spiritual rights, both in regulatory institutions and banking institutions. Based on these findings, it is recommended that regulatory institutions, especially the Financial Services

³⁸ M. Umer Chapra and Habib Ahmed, *Corporate Governance in Islamic Financial Institutions, Occasional Paper* (Jakarta, 2014), vi.

³⁹ The six commitments are 1) Banking; 2) Capital Markets; 3) Non -Bank Financial Industry (IKNB); 4) Sharia; 5) Payment System; and 6) Financial Technologies.

⁴⁰ Ori Lewi.

⁴¹ Hudiyanto (Directorate of Legal Development and Consumer Protection of the Financial Services Authority).

Authority, pay adequate attention to the entire financial service industry according to their respective characteristics. The assessment as mentioned earlier is based on the results of the analysis of the intended regulatory content, using elements of sharia compliance related to dispute resolution, which consists of four things, namely a particular clause on sharia compliance, provisions on the competency requirements of judges/arbiters, and provisions regarding legal material referred to in the decision must be following or not in conflict with sharia. The institutions implementing the decision must also support the enforcement of Islamic law.

Based on these conclusions, it is recommended that the Financial Services Authority as the regulatory authority as referred to in the study, has a strategic role in paying adequate attention to fulfilling the spiritual rights of sharia banking consumers. Also, support is needed from various related institutions to increase consumer trust through the protection of spiritual rights, including National Law Development Institution, National Land Institution, National Sharia Council, professional associations, and others, under their respective primary duties and functions.

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